WP(C) 3257/2007
BEFORE
HON'BLR MR JUSTICE AMITAVA ROY

JUDGEMENT AND ORDER(ORAL)

The settlement of Kharikhana weekly market (hereinafter referred to as the 'market') located within the territorial jurisdiction of Dhalpukhuri Anchalik Panchayat in favour of the respondent No.6 forms the subject matter of challenge in the instant proceeding.

2. I have heard Mrs R.Borah, Advocate assisted by Md Giash Uddin, Advocate for the petitioner, Ms HM Phukan, learned counsel for the respondent No.4 , Mr PS Deka, learned State counsel for the official respondents and Mr PK Deka, learned counsel for the private respondent No.6.

3. The petitioner's pleaded case is that in response to a Notice Inviting Tender (hereinafter referred to as 'NIT') floated on 17.4.2007 by the Nagaon Zila Parishad(hereinafter referred to as the 'Zila Parishad') inviting tenders amongst others , for settlement of the market for the period 1.7.2007 to 31.7.2008 he, along with others offered their candidature. The bids submitted by him and others were as follows :-

Names Bid value
(1) Md Giash Uddin Rs. 2,11,000.00
(2) Haji Abdul Mazid (petitioner) Rs. 2,05,000.00
(3) Siraj Uddin Mazumdar (Respondent No.6) Rs. 1,76,000.00

(4) Sazid Ali Rs. 68,000.00
(5) & & & &.. & & &.

The petitioner has stated that the tender of the highest bidder having been rejected, he with the offer of Rs.2,05,000.00 was entitled to be settled with the market. He has maintained that in his tender form apart from submitting all essential documents, he had made a declaration that he was ready to pay the entire kist money within seven days of the settlement. While he was thus waiting in expectation of being endowed with the settlement of the market, the same was illegally settled with the respondent No.6 at his lesser offer of Rs.1,76,000/-. As his repeated representations for a copy of the comparative statement did not yield any result, he turned to this Court for redress.

4. The respondent No.4 in his affidavit, while endorsing the impugned decision has submitted that the petitioner's tender having been found irregular , he not having submitted the non encumbrance certificate pertaining to the land offered as mortgage by way of security, the respondent No.6 was rightly settled with the market. He affirmed the position that the tender of the highest bidder was rejected as the same was invalid. According to the answering respondent, the General Standing Committee of the Zila Parishad in its meeting held on 6.6.2007 on a scrutiny of the tenders submitted came to the above conclusion which in law is valid and thus unassailable. The said committee also did not accept the petitioner's tender as the offer quoted by him was assessed to be exorbitant.

5. The respondent No.6 while substantially reiterating the above stand of the Anchalik Panchayat has asserted that after being settled with the market as required, he had made necessary deposits. He has maintained that the impugned decision was taken on the approval of the appropriate authority of the government. According to the said respondent, the petitioner's tender was invalid, he having failed to submit therewith the non encumbrance certificate relating to the land offered as mortgage.

6. Ms Borah with reference to clauses 3 and 8 of the NIT has argued that the petitioner's tender being valid on the rejection of the highest bidder, he ought to have been settled with the market. Relying particularly on clause 8 of the NIT, the learned counsel has urged that as it is apparent therefrom that

on an undertaking to deposit the entire offered amount within a period of seven days of the settlement, no description of immovable property cited as security was essential , the ground on which the petitioner's tender has been purportedly rejected is non est in law , ineffectual and null and void. She has further argued that as the comparative statement prepared by the General Standing Committee does not reflect that the petitioner's tender had been rejected also on the ground that the bid offered by him was exorbitant , the plea in law is not available to the respondents at this stage. To buttress her arguments, Ms Borah has placed a decision of this Court in 2005 (3) GLT 580, Benjamin Lalrinawma, Petitioner v. State of Mizoram and Ors, Respondents.

7. Ms Phukan in reply has contended that the petitioner having failed to comply with the imperative conditions of the NIT, his tender was rightly rejected by the General Standing Committee and therefore his grievance is not sustainable in law. According to her, it was incumbent on the part of the petitioner to file along with the tender the non encumbrance certificate pertaining to the land offered by him as mortgage and he admittedly not having done so, the impugned decision of rejecting his tender and awarding the market to the next higher bidder i.e. respondent No.6 cannot be faulted with. She also contended that the petitioner's tender was invalid as the offer made by him was exorbitant in the contemplation of the General Standing Committee. She also produced the relevant records for the perusal of this Court.

8. Mr Deka while reiterating the above submissions, has argued that on a plain reading of the NIT conditions, it is obvious that for a tender to be valid, the same has to be accompanied by documents referred to therein . As admittedly the petitioner had not submitted the non encumbrance certificate of the land mentioned by him to be offered as mortgage, the same was rightly rejected. According to him, clause 8 did not obviate the necessity of submission of the non encumbrance certificate. In any view of the matter, according to him, the decision being within the discretion of the authority concerned to accept and/or reject a tender ,the petitioner's tender having been rejected on a valid ground, this Court in the exercise of its judicial review would not interfere with the impugned order. Mr Deka has drawn sustenance for his submissions from the decision of the Apex Court in AIR 1976 SC 714, Lachmi Narain etc. Appellants v. Union of India & Ors, Respondents, (2004) 4 SCC 19, Directorate of Education and others , Appellants vs. Educomp Datamatics Ltd. and Ors, Respondents and of this Court in 2003(2) GLT 485, Bikash Bora, Appellant v. State of Assam & Ors, Respondents and 2005(3) GLT 580, Benjamin Lalrinawma, Petitioner vs. State of Mizoram & Ors, Respondents.

9. I have extended my anxious consideration to the rival submissions. That the petitioner's bid after the rejection of the highest offer by Md Gias Uddin was higher than that of the respondent No.6 is an admitted fact. Whereas, the petitioner had quoted Rs.2,05,000.00 ,the respondent No.6's offer was Rs.1,76,000.00. A perusal of the records produced corroborates the petitioner's stand that in his tender form he had made a declaration undertaking to deposit the entire kist money as offered by him at a time within a week of the order of settlement if granted to him. A scrutiny of the documents annexed to it demonstrates that the non encumbrance certificate of the land offered as mortgage had not been furnished therewith. The comparative statement in original reflects amongst others that the Standing committee had noticed the petitioner's undertaking to the above effect and the same is recorded in the remark column thereof. The omission to submit the non encumbrance certificate however, was also recorded. The tender of the respondent No.6 was found to be complete in all respects. He however, did not make a declaration like the petitioner. It is more than clear from the comparative statement that the petitioner's tender was rejected on the ground of his failure to submit the non encumbrance certificate. No other ground was cited in support of the said conclusion. In that view of the matter, the plea of the Anchalik panchayat bearing on the exorbitance of the petitioner's offer cannot be taken note of. The Anchalik panchayat in view of the ground assigned by the Standing committee referred to hereinabove, to reject the petitioner's tender cannot be permitted to improve its case by an affidavit in this proceeding

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10. The scrutiny therefore essentially has to be limited to the ground of non submission of the non encumbrance certificate by the petitioner.
11. The NIT on a plain reading reveals that in terms of clause 3 thereof, the preference was to be extended to the highest bidder. Clause Kha however, makes it obligatory on the part of the tenderers to furnish along with their tenders , a non encumbrance certificate in respect of loan, tax, revenue etc. with the indication that in case of any proof of non payment of such revenue, loan, tax etc. the settlement even if offered would be cancelled after finalization thereof. Clause 8 which appears to be sheet anchor of the petitioner's case ,stipulates that if the lessee selected deposits within seven days of the settlement, the amount offered as a whole, it would be inessential to disclose the particulars of the property offered by way of mortgage. The said clause requires that to avail such benefit, the tenderer concerned would make an undertaking to the above , otherwise any tender lacking in particulars of the land offered as mortgage would not be accepted.
12. In other words, in terms of the above clause, a liberty was granted to a tenderer to offer payment of the entire amount of his bid within a period of seven days in lieu of mortgage as a security therefor. It was however, incumbent for the tenderer to express his mind to that effect by making a declaration in the tender. The said clause of the NIT also made it manifest that in absence of any such declaration ,any tender lacking in particulars of the land offered as mortgage would be rejected. Reading the clause as a whole, I am of the view that the authority concerned sought to stipulate thereby that it was not imperative for a tenderer to offer any mortgage of any immovable property as security for the amount of his bid, in case, he made a declaration of his preparedness to pay off the entire amount within seven days of settlement made in his favour. Clause 8 therefore, in my view has to be read and understood to have relaxed to that limited extent , the requirements in clause 'Kha' of submission of non encumbrance certificate in respect of the loan, tax, revenue etc. pertaining to the land proffered for mortgage. The NIT conditions as per the fundamental principles of interpretation of documents have to be construed harmoniously so as to render the same to be workable. Clauses 6 and 8 read together supports the above view. It is understandable that the respondent authorities were fully mindful of the implication of the said two clauses and had not intended those to be mutually annihilative. In my considered opinion, therefore, in case the tenderer in his tender form makes a declaration undertaking to pay the entire amount of his offer within seven days of his settlement, he is not required to furnish the particulars of any immovable property mentioned to be offered as mortgage therefor. The requirement of submission of non encumbrance certificate enjoined by clause Kha is not inflexibly obligatory in nature in all situations.
13. In that view of the matter, in the face of the unambiguous and categorical undertaking by the petitioner in his tender form to deposit the entire amount quoted by him within seven days of the order of settlement if made in his favour , the ground of rejection thereof as reflected in the comparative statement is clearly incongruent with the express provisions of the NIT and thus cannot be sustained. The respondent authorities having incorporated the covenants in the NIT published to be understood and acted upon, they cannot be permitted to depart therefrom , particularly in a public process of the present kind.
14. The decision in Lachmi Narain etc(Supra) is on the rule of interpretation of a provision in a statute to determine the mandatory or directory nature thereof. The Apex Court held that the primary key to the answer is the legislative intention .In view of the inter play of 'Kha' and clause 8 of the NIT conditions noticed hereinabove, the decision is of no avail to the Respondent No.6.
15. While there cannot be two opinions vis a vis the scope of judicial review, qua, the terms of a tender prescribing the eligibility criteria of a participant in a process as has been reiterated by the Apex Court in Directorate of Education and others(Supra), the proposition enunciated therein does not

advance the cause of the respondent No.6 in the present fact situation. In the teeth of the undertaking given by the petitioner to pay the entire amount of his bid within seven days of his settlement as comprehended in Clause 8 of the NIT, the decision of this Court in Bikash Bora(Supra) highlighting the consequence of infraction of mandatory conditions precedent for a valid tender is also of no assistance to the respondents.

16. The decision in Benjamin Lalrinawma (Supra) as well does not fit in with the facts in hand.

17. The decision of this Court in Intaz Ali (Supra) turns on the proposition which in not essential to be dealt with presently. The petitioner's tender , as the records reveal had not been rejected on the ground that his offer was exorbitant. Though it has been contended by the respondent No.6 that his settlement has the approval of the government, the records produced do not reveal any indication thereof. The respondent authorities having proceeded to act in repudiation of clasue 8 of the NIT condition the impugned decision is vitiated by the vice of non transparency , arbitrariness and unreasonableness.

18. In view of the determinations as above , I find sufficient force in the writ petition. The ground of rejection of the petitioner's tender is unsustainable. Consequently, the settlement in favour of the respondent No.6 has to be interfered with. Ordered accordingly. In the result, the petition succeeds. The communication dated 18.6.2007 settling the market in favour of the respondent No.6 is set aside. No costs.